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No. 92-798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners

v.

COALITION FOR CLEAN AIR, *et al.*

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

THE LOS ANGELES AREA CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S PETITION FOR A WRIT OF CERTIORARI

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THE LOS ANGELES AREA CHAMBER OF COMMERCE'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Los Angeles Area Chamber of Commerce hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the United States Environmental Protection Agency's petition for a writ of certiorari. The Chamber of Commerce obtained the consent of petitioner United States Environmental Protection Agency (EPA) and of the following parties below: Southern California Association of Governments (SCAG), Southern California Edison Company, Southern California Gas Company, and the South Coast Air Quality Management District (SCAQMD). The Chamber has filed with the Clerk of the Court telefaxed letters from these parties, addressed to the Chamber's attorneys, indicating such consent. The consent of the attorney for respondent Coalition for Clean Air and Sierra Club, Inc. was requested but refused. Representatives of the Environmental Council of Sacramento and Sierra Club, Inc., who par-

ticipated as *amici curiae* in the court of appeals proceeding, could not be reached.

The interest of the Los Angeles Area Chamber of Commerce in this case arises from its members' intimate connection with the Los Angeles area economy and the effect of federal and state environmental regulation upon it. The Chamber is in a unique position to express the Southern California business community's serious concern about the severe and widespread effect of the Ninth Circuit's ruling, and of a federal implementation plan, on persons other than the immediate parties, specifically, the people and businesses of Los Angeles. As the representative of many of the businesses that must ultimately comply with whatever regulations are promulgated, the Chamber is able to place the case in its broadest and most significant factual context. Specifically, the Chamber offers its *amicus curiae* brief to assist this Court in determining whether, among other reasons, the severe practical consequences of the decision below to Southern California's social and economic well-being warrant granting the petition.

Dated: December 7, 1992

Respectfully submitted,

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THE LOS ANGELES AREA CHAMBER OF COMMERCE'S BRIEF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S PETITION FOR A WRIT OF CERTIORARI

The Los Angeles Area Chamber of Commerce submits this brief in support of the United States Environmental Protection Agency's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTEREST OF THE *AMICUS CURIAE*

The Los Angeles Area Chamber of Commerce is an organization of approximately 2,300 members representing various and diverse businesses in the Southern California region. Its membership comprises and employs some of the millions of Californians who stand to lose the most under the decision of the Ninth Circuit.

Chamber members are the primary employers in Southern California. They employ approximately one million people in manufacturing, financial services, health care delivery and international trade. The member companies of the Chamber have headquarters or business operations in the five counties of the South Coast and Ventura air basins in California. Thus, they and their employees would be directly affected by the enforcement of the Federal Implementation Plan (FIP) under the order of the court below.

The purpose of this brief *amicus curiae* is to present information not fully before the Court concerning the extent and severity of the practical consequences of the Ninth Circuit's opinion. Furthermore, the Chamber anticipates that the parties may take opposing positions on the potential impact of the decision on the South Coast economy. The Chamber has sought leave of the Court to file this brief *amicus curiae* to demonstrate that, from the direct perspective of the California residents whose employers would be subject to these regulations, the Ninth Circuit's decision promises widespread hardship. Among the primary interests of the Chamber are both the protection and promotion of the economic health of the Southern California area and the quality of life of Southern California residents, including the value of clean air. As a practical matter, enforcement of the Ninth Circuit's order would directly and adversely affect the region's economy, without materially assisting the region in obtaining clean air.

In presenting information to the Court, the Los Angeles Area Chamber of Commerce brings an important and unique perspective. The members of the Chamber of Commerce are the entities that would be regulated under a FIP and who would need to determine how best to comply with two layers of environmental regulations (i.e., federal and state) in an economic climate where many are finding it difficult to survive. The Chamber will necessarily speak with a more urgent voice than can the regulatory agencies already parties to this action.

Based on the foregoing, the Chamber has a vital interest in obtaining review of the Ninth Circuit's decision.

REASONS FOR GRANTING THE PETITION

This case involves the basic structure of the Clean Air Act Amendments of 1990 (1990 Amendments) and the economic health of the nation's largest industrial area. In 1970, Congress established a regulatory scheme whereby state and local agencies decided upon and enforced the specific combinations of environmental regulations that would best achieve national clean air goals with a minimum of social and economic dislocation in their particular states and localities. 42 U.S.C. 7410(a)(1). This system of state and local responsibility was confirmed in amendments to the Clean Air Act passed in 1977 and 1990. *See e.g.*, 42 U.S.C. 7401(a)(3) (Supp. II 1990). A divided Ninth Circuit panel, however, has decided that the federal government, and not state and local authorities, must design the attainment plan for the South Coast region of California *before* California, the Southern California Association of Governments (SCAG) and the South Coast Air Quality Management District (SCAQMD) have the opportunity, expressly provided by Congress in 1990, to develop their plan.

Review by this Court is warranted for at least two reasons. First, if the petition for a writ of certiorari is denied, the clear and consistent policy choice that lies at

the heart of Congressional efforts to control air pollution—that states should take the primary and initial role in planning—will have been reversed by judicial fiat. Second, the error of the panel below, if not corrected, will cause severe economic and social dislocation to the Los Angeles area, and its thirteen million residents, at precisely the time when it is least able to accommodate it. It is difficult to imagine a worse time to impose duplicate environmental regulations on Southern California businesses. The severe negative consequences of the Ninth Circuit's order on the region constitute special and important reasons for review by this Court. Rules of the Supreme Court, Rule 10.1.

The Chamber supports fully the legal analysis of the 1990 Amendments contained in EPA's petition. This *amicus curiae* brief will, therefore, address only the reasons why, as a practical matter, the adoption of a FIP would impose such an unwarranted and burdensome impact on the region.

The Chamber recognizes that attaining the national ambient air quality standards (NAAQS) may require measures that impose greater social and economic burdens on the Southern California region than are necessary in any other region of the country. In fact, such burdens are the inevitable consequence of the current attainment plan for the region, adopted as a result of the lengthy and comprehensive planning by the California Air Resources Board, SCAG and the SCAQMD, with considerable assistance of numerous local jurisdictions and other state agencies. Previous South Coast plans have been widely recognized as the most ambitious and effective in the country, and the current plan preserves that distinction. It is appropriately stringent, but it has the virtue of spreading its regulatory burdens across the wide and diverse categories of sources that collectively contribute to the region's air quality problem, including large and small businesses, households, commercial establishments

and a wide variety of vehicle and engine types. It thus reflects the complexity recognized by Congress when it granted states the primary planning role. As also intended by Congress, the plan is designed to balance the burdens of regulation with its inevitable significant economic and social impact. In Southern California, then, the Ninth Circuit's order would require EPA to impose a FIP on the region that has conducted the most extensive planning of any in the nation—circumstances virtually the opposite of those envisioned by Congress.[1]

In this context, a FIP will impose severe additional burdens without materially advancing the cause of clean air. The reasons are several: (1) EPA lacks the wide range of tools needed to address the diversity of sources in the South Coast; (2) the FIP process, by its nature, will be hastily crafted and insensitive to local circumstances; (3) over time, the FIP process will be less responsive to emerging technologies and shifting economic and social conditions; and (4) the FIP will create a dual set of regulations and thus confuse and potentially paralyze regulated entities.

In contrast to the wide range of planning and regulatory tools available to state and local government, EPA has, for practical and legal reasons, far fewer tools at its disposal to achieve the required degree of emissions reductions (over 80 percent). As a practical matter, EPA lacks sufficient information about many of the sources for which it would need to set emission standards under

[1] Under the pre-1990 Act, even the nation's best air quality plan, the South Coast plan, was viewed as deficient because it could not project ultimate success. Congress addressed this paradox through the 1990 Amendments by authorizing EPA to judge the adequacy of a plan, in the interim, by its success at meeting interim progress milestones, *see* 42 U.S.C. §§ 7511a(c)(2)(B), 7511a(g), and by allowing the South Coast to demonstrate ultimate attainment by anticipating as yet undeveloped technologies. 42 U.S.C. § 7511a(e)(5). In making these changes, Congress remedied the only deficiencies in the states' plan.

the FIP. This is true, for example, of the many hundreds of small manufacturing facilities, whose emissions are too small to have triggered the pre-1990 Act's definition of "major sources." While EPA developed a series of control technique guidelines (CTGs) for major volatile organic compound (VOC) sources in the late 1970's, it simply lacks sufficient technical familiarity with the range of small VOC sources that do not fall within those CTG categories and that are currently regulated by the SCAQMD plan. The 1990 proposed FIP illustrates this limitation. Instead of setting standards for individual source categories, EPA proposed a blanket 90% reduction for all major stationary source categories in the event that the region failed to meet certain trigger events. *See* 55 Fed. Reg. 36,518 (1990) ("Because EPA has so far been unable to develop implementable control measures for a portion of the VOC inventory, the level of control for most of the backstop measures must be sufficient to reduce 1987 or 1990 base year emissions by 90 percent.") Such an across-the-board strategy, particularly if adopted *in addition to* existing state and local standards,[2] is blind to differences among sources in their ability to control emissions and in the potential impacts of regulation. It is almost inevitable that such an approach will impose hardships that would more easily be avoided by the region's plan.

Likewise, although EPA can enforce minimum national motor vehicle emission standards and certain fuel regulations, it cannot regulate the use of the automobile by

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[2] The proposed 90% FIP requirement would be calculated from 1987 or 1990 base year emissions, notwithstanding the fact that most stationary sources in the basin already have been heavily regulated in past years. Thus, although the SCAQMD plan regulates many of such sources further, a FIP would almost certainly impose additional reduction requirements, regardless of whether the technology for such additional reductions exists. For many sources, the EPA requirement for a 90% reduction beyond 1987 or 1990 levels could only be met by curtailing or shutting down operations.

means of indirect source controls or otherwise require land use restrictions. *See* 42 U.S.C. §§ 7410(a)(5) (regarding limits to EPA's indirect source authority), 7431 (protecting local land use authority). Moreover, to the limited extent EPA can regulate automobile use, it lacks the practical capacity to implement and enforce such regulations. Because it cannot manage the region's transportation programs, the FIP is likely to contain partial bans on the use of vehicles as the only way to address the region's anticipated growth in vehicle miles travelled. *See* EPA Petition for a Writ of Certiroari at 24.

Given its inability to adopt carefully tailored regulations for the complete range of sources in the South Coast basin, EPA would be much better suited to filling gaps in the state plan if it ultimately determines that the plan falls short of the Act's requirements. However, EPA will not know whether and to what extent such gap-filling is necessary until the South Coast attainment plan is submitted in the fall of 1994, two years from now.

In addition to lacking the necessary information and authority to craft an effective FIP, the EPA lacks sufficient time and opportunity for public input. Although the actual schedule for the FIP has not been set, EPA may well be granted a limited time in which to plan. Under stringent time constraints, the Agency will not be able to remedy its lack of information or to solicit and review public comment. Rulemaking at the local level ordinarily requires several steps, involving an initial workshop by the agency to gather information about specific source categories, followed by publication of one or more draft regulations and a series of meetings or hearings for the agency to receive public comment. Often the local agency visits one or more facilities to view operations first hand. This process occurs for each of the over one hundred rules promulgated by the SCAQMD. By contrast, EPA

must propose and promulgate final emission standards for this enormous variety of sources in a limited period of time, all as part of a single rulemaking action. In such a context, EPA will be unable to take into account individual circumstances of specific sources or source categories to any significant degree. As a result, FIP requirements are almost certain to cause unintended adverse impacts on many of the sources the FIP regulates. EPA anticipated these impacts in its 1990 proposal: "The severe backstop emission reduction requirements derive from areawide reduction requirements of the FIP, rather than from the normal Agency assessments of available technologies. As such, they may be costly and disruptive, . . ." 55 Fed. Reg. 36,518 (1990).

A third reason why EPA's FIP regulations would be certain to inflict unwarranted distress on Southern California is that the FIP is less susceptible to change. Under the Act, the state can continue to refine and improve its plan for the South Coast throughout the period from enactment of the 1990 Amendments until attainment in the year 2010. During the interim years, the South Coast can rely on the emergence of technologies that do not yet exist, so long as the region meets interim progress requirements. *See* 42 U.S.C. §§ 7511a(e)(5). Throughout this period, the state may evaluate changes in its emissions inventory (due, for example, to shifting economic and social conditions), and in the available array of emission reduction technologies. Based on these changing conditions, the state would assuredly revise its plan on an ongoing and regular basis. This is encouraged by Congress to achieve the dual goals of clean air and a healthy economy. While, in theory, EPA could continually revise the FIP to reflect similar developments, such flexibility would almost certainly be absent at the federal planning level due to a shortage of necessary resources to continue to track and revise the plan. The lack of flexibility will prevent EPA from capitalizing on

emerging control opportunities and from mitigating unintended impacts when they materialize.

The final reason why the FIP would impose unwarranted and severe burdens on the region is that it would establish a duplicative set of emission standards on regulated entities. Already, sources in the South Coast comply with the most comprehensive set of air quality standards ever enacted, comprising hundreds of pages of detailed provisions. As is amply illustrated by EPA's 1990 proposal, any FIP that does more than fill gaps in state regulation will leave sources uncertain as to whether they should invest in technologies that will meet the current state plan or whether they should instead prepare to meet a different federal standard. Characterizing the federal standard as a "backstop" helps little, of course, because businesses planning for compliance must take into account the contingency that the backstop will be triggered by a state failure to meet federal requirements. This dual planning will inevitably add considerable cost to businesses in the region, and deliver a damaging blow to the region's efforts to retain and attract businesses.

Whatever the ultimate content of a FIP, the EPA's lack of sufficient information and tools to craft a carefully tailored and effective program, the haste with which it would have to act, its inability to respond to future changes in the region, and the burdens of compliance with two sets of regulations make it certain that a FIP would deliver a terrible blow to Southern California when it can least afford it. While such a hammer would arguably be justified if the region had failed to meet its responsibilities under the 1990 Amendments, that is clearly not the case here, as the current South Coast plan is the most comprehensive and aggressive plan enacted anywhere in the country.

Now, especially, the California economy requires the care, precision and subtlety of the state implementation

plan (SIP) process. The Los Angeles region is a vibrant community, with a dynamic yet fragile economy in which change—in demographics, economics, and technology—is the only constant. The region needs a planning approach that is able to adapt to and capitalize on everyday changes. Mindful of this fact, Congress confirmed in the 1990 Amendments that state and local governments were to play the primary role in crafting attainment strategies. The EPA, on the other hand, is for practical reasons institutionally incapable of meeting the attainment goals of the Clean Air Act for the South Coast without causing substantial disruption. Its failures would stem not from any inherent weakness in the EPA itself but rather from the Ninth Circuit's attempt to force the FIP process into a situation in which Congress did not intend it to be used. As fully developed by the Solicitor General's Petition, the plain language of the 1990 Amendments to the Clean Air Act, as well as its legislative history, demonstrate that Congress did not intend a result, as ordered by the Ninth Circuit that is impracticable, unwise and harmful to the region.

CONCLUSION

There are special and important reasons for review of the Ninth Circuit's decision. This case involves questions of enormous practical significance for the people of the South Coast and other areas of California. Congress granted the state and the region the time to craft an attainment program with care. If EPA's petition is denied, the citizens and businesses of the Los Angeles area will be denied that opportunity. Instead, the federal government will make the choices for them. Without the necessary time, tools and process, EPA will necessarily adopt a FIP that imposes unwarranted social and economic hardship. The Chamber believes the degree of such impact could be staggering. It need not be so. The Chamber respectfully urges the Court to grant the petition for writ of certiorari or, in the alternative, based on the

compelling legal arguments articulated in EPA's petition, to consider summary reversal.

Respectfully submitted,

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